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CRIMINAL LAW — PROSECUTOR CALLING A WITNESS TO THE STAND FOR THE PURPOSE OF EXACTING A CLAIM OF THE PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT PREJUDICIAL ERROR. *Namet v. United States* (United States Supreme Court 1963).

Namet and Mr. and Mrs. Kahn were charged with violation of a federal wagering tax law.¹ Prior to the trial the Kahns pleaded guilty. Namet persisted in his innocence and was brought to trial. The prosecutor called Mrs. Kahn as a witness. She refused to testify, asserting her privilege against self-incrimination. The court ruled that since she had pleaded guilty she must answer questions concerning her own gambling activities, but as to third persons her privilege still existed.² After this ruling the prosecutor made no attempt to connect Mrs. Kahn with Namet. Later the prosecutor called Mr. Kahn. After a series of questions concerning his gambling activities, four questions were asked. His refusal to answer these questions was sustained. Each question was designed to connect Mr. Kahn with Namet.³ The jury was charged relative to these two incidents: "Nor should any inference be drawn against him (Namet) because of the Kahns (*sic*) refusal to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt."⁴ (Emphasis added.)

No objection was made to this charge. Namet was found guilty. He moved for a new trial on the ground of prejudicial misconduct on the part of the prosecutor in asking questions which he knew the witness would refuse to answer. This motion was denied. Namet's conviction was upheld by the First Circuit.⁵

The Supreme Court affirmed. Since much of the Kahns' testimony was non-privileged and material, the prosecutor committed no

¹ 26 U.S.C. § 4411 (1958). "IMPOSITION OF TAX. There shall be imposed a special tax of \$50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

² The court eventually concluded that Mrs. Kahn's plea of guilty to the charge of engaging in the business of accepting wagers deprived her of the right to refuse to testify about her own gambling activity. But the court also ruled that she did not have to testify about dealings with third persons since she was still, at least theoretically, subject to prosecution for conspiracy, or possible bribery. *Namet v. United States*, 373 U.S. 179, *affirming* 301 F. 2d 314 (1st Cir. 1963).

³ *Id.* at 184, n.3. The questions were:

"Can you tell us what those dealings (with others) were?"

"And were you paid a commission on all bets you took in your variety store?"

"Who did you accept bets from that you took in your variety store?"

"Did you ever take bets from the defendant, David Namet?"

⁴ 373 U.S. at 185.

⁵ 301 F. 2d 314 (1st Cir. 1963).

error by putting them on the stand. The asking of the questions assigned as error was nothing more than a minor lapse during a long trial. The majority of the court also reasoned that since the impropriety of the instruction had not been preserved on appeal,⁶ the substantial rights of the defendant had not been affected so as to demand reversal under Rule 52(b) of the Federal Rules of Criminal Procedure.⁷

The dissent argued that the prosecution obviously knew the questions were privileged and would not have asked them unless they would have helped the government's case. This, coupled with the instruction which allowed the jury to infer as much as its fancy dictated, was simply an unfair way for the government to obtain convictions. *Namet v. United States*, 373 U.S. 179 (1963).

Namet distinguished prior federal decisions on their facts. It did not overrule them.⁸ The Supreme Court granted certiorari for an asserted conflict in the circuits.⁹ There was, however, no conflict among the circuits in principle. Prior federal decisions had indicated that four elements must be present before reversal could be granted: (1) asking the privileged question,¹⁰ (2) bad faith by the prosecutor,¹¹ (3) absence of a curative instruction,¹² and (4) aggravated circumstances.¹³

*United States v. Maloney*¹⁴ is the only reported Federal decision holding that it is reversible error for the prosecutor to call a witness, knowing that the witness will, because of his complicity with the defendant, refuse to testify on the ground of self-incrimination. *Maloney* involved a blackmail indictment with five co-defendants.¹⁵ One of the five, having already pleaded guilty, was called as a witness for the prosecution. His testimony was subject to serious impeachment because of his past criminal record and because he was an accomplice seeking leniency. Considering these factors it was un-

⁶ FED. R. CRIM. P. 30, "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

⁷ FED. R. CRIM. P. 52 (b). "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

⁸ 373 U.S. at 187.

⁹ *Id.* at 180.

¹⁰ *United States v. Tucker*, 267 F. 2d 212 (3d Cir. 1959).

¹¹ *United States v. Cioffi*, 242 F. 2d 473 (2d Cir. 1957).

¹² *Weinbaum v. United States*, 184 F. 2d 330 (9th Cir. 1950); *United States v. Amadio*, 215 F. 2d 605 (7th Cir. 1954).

¹³ *United States v. Hiss*, 185 F. 2d 822 (2d Cir. 1950).

¹⁴ 262 F. 2d 535 (2d Cir. 1959).

¹⁵ There were five counts in the indictment: Conspiracy to commit blackmail; abetting Maloney in false pretenses; demanding money; obtaining money; the fifth was dismissed by the court.

likely that the jury would believe his testimony without corroboration. To accomplish corroboration, the prosecutor called three other witnesses. All the questions asked of these witnesses were directed at connecting Maloney with the crime. In each instance, after being prompted by the defense, the witness refused to testify. The court sustained their refusal. In his summation to the jury, the prosecutor, conceding that he knew or anticipated that two of the witnesses would refuse to testify, then proceeded to draw adverse inferences from their refusals. The defense did not request a curative instruction and none was given. The Court of Appeal stated that the failure to give a curative instruction *sua sponte* was fundamental error within the purview of rule 52(b).¹⁶

Maloney was the bulwark of *Namet's* appeal. However, it was distinguished on its facts. The court ultimately held that the errors in *Namet* were not sufficiently prejudicial nor was the record so conclusive as to bad faith as to warrant a reversal.

A survey of state and federal decisions indicates that *bad faith* exists when the prosecutor knowing that a witness will refuse to testify calls the witness so that the jury may draw an unfavorable inference towards the defendant because of the witness' refusal to testify.¹⁷ Bad faith has been found, in prior decisions, to exist in cases involving the following factual situations. (1) In pretrial interrogation the witness refused to answer on the ground of self-incrimination and the prosecutor called the witness during the trial.¹⁸ (2) Where there has been a mistrial or a reversal and a new trial ordered and in the first trial the witness refused to testify on the ground of self-incrimination and the prosecutor called the witness to the stand in the second trial.¹⁹ (3) Where counsel for the witness or, for that matter, for the defendant states that the witness will refuse to testify, bad faith may be shown.²⁰ (4) Where the prosecutor stages the incident. This may result when everything indicates that the witness will refuse to testify but the prosecutor calls him for its effect.²¹

Where the prosecutor in bad faith calls the witness, defense counsel should make a seasonable objection to preserve the question on appeal.²² No error can be predicated on such an incident where the

¹⁶ FED. R. CRIM. P. 52 (b).

¹⁷ Annot., 86 A.L.R. 2d 1443 (1961).

¹⁸ The point is discussed in *People v. Kynette*, 15 Cal. 2d 731, 104 P. 2d 794 (1940).

¹⁹ *United States v. Tucker*, 267 F. 2d at 215.

²⁰ *Washburn v. State*, 164 Tex. Crim. 488, 299 S.W. 2d 706 (1956); *Johnson v. State*, 158 Tex. Crim. 6, 252 S.W. 2d 462 (1952).

²¹ *Washburn v. State*, *supra* note 20; *DeGesualdo v. People*, 147 Colo. 426, 364 P. 2d 374 (1961).

²² *United States v. 5 Cases*, 179 F. 2d 519 (2d Cir. 1950).

questions relate to the offense to which the witness has pleaded guilty or has been convicted.²³

The state courts which have considered the question raised in *Namet*, in contrast with federal decisions, are in discord.²⁴ Generally three positions are taken: (1) Error which is sufficiently prejudicial and aggravated is a ground for reversal even though a curative instruction is given.²⁵ (2) Reversible error is cured²⁶ if the jury is instructed to disregard the witness' refusal to testify.²⁷ This is the majority view and the position taken by the federal courts.²⁸ (3) The defendant cannot be prejudiced, on the theory that immunity is a personal privilege, and although the witness cannot be compelled to answer he must exercise his claim on the stand.²⁹

Texas held, in *Washburn v. State*,³⁰ that there was prejudicial error where protracted questioning of a witness (twenty-two pages of the printed record) ensued after a refusal to testify had been sustained. The appellate court held that a curative instruction did not purge the effect of such conduct upon the jury. This case appears to be singular in its holding, *i.e.*, a curative instruction not purging the error.

Two California decisions have considered whether these situations are prejudicial error: *People v. Plyler* (1889)³¹ and *People v. Kynette* (1940).³² In *Plyler* the prosecutor called as a witness a confederate under indictment for the same offense. The witness refused to testify on the ground of self-incrimination. In holding that no error was committed, the Supreme Court of California stated:

It is urged that this was error, tending to prejudice defendant's case before the jury. Either the district attorney was of exceptionally sanguine temperament or his hope of eliciting any valuable testimony from a witness situated as was Schoedde must have been extremely slight. Still, error cannot be predicated upon futile effort,

²³ *United States v. Gernie*, 252 F. 2d 664 (2d Cir. 1958); *United States v. Romero*, 249 F. 2d 371 (2d Cir. 1957).

²⁴ Only five states have reported decisions considering the question: California, Colorado, Iowa, Massachusetts, and Texas.

²⁵ *Washburn v. State*, 164 Tex. Crim. 488, 299 S.W. 2d 706.

²⁶ See Annot., 86 A.L.R. 2d 1443 (1961). A curative instruction is one which charges the jury that they must disregard the refusal of the witness to testify and that no inference one way or the other may be drawn towards the defendant because of the refusal.

²⁷ *People v. Kynette*, 15 Cal. 2d 731, 104 P. 2d 794 (1940); *DeGesualdo v. People*, 147 Colo. 426, 364 P. 2d 374 (1961); *Commonwealth v. Granito*, 326 Mass. 494, 95 N.E. 2d 539 (1950).

²⁸ 262 F. 2d 535.

²⁹ *State v. Snyder*, 244 Iowa 1244, 59 N.W. 2d 223 (1953).

³⁰ 164 Tex. Crim. 53, 251 S.W. 1099 (1923).

³¹ 121 Cal. 160, 53 Pac. 553 (1898).

³² 15 Cal. 2d 731, 104 P. 2d 794 (1940).

even though it was followed by all the injurious effects which defendant portrays; for Schoedde still was a competent witness for the prosecution, and could refuse to testify only by exercise of the privilege of which he availed himself.³³

Whether the prosecutor knew the witness would not testify and called him solely for the effect upon the jury is not clear from the record. However, the language of the court indicates that such knowledge and conduct on the part of the prosecutor would not be a sufficient basis upon which to predicate error.

In *Kynette* three police officers who were called as witnesses had, prior to the trial, asserted their respective privileges against self-incrimination, once in the prosecutor's office and once before the grand jury. *Kynette* was charged with attempted murder. There was some indication that the three witnesses had participated in wire-tapping, a crime under the California Penal Code.³⁴ Each witness refused to testify when called to the stand by the prosecutor. The opinion does not clearly indicate whether the calling of these witnesses under the circumstances constituted harmless error or no error at all. The California Supreme Court found that the prosecutor's questioning of these witnesses was not prejudicial. The fact that these witnesses previous to the trial had asserted extrajudicially their constitutional right to refuse to answer did not preclude the prosecution from calling them during the trial and interrogating them under oath, upon the subject of wire-tapping, in the hope that in the interim they might have undergone a change of mind and be willing to disclose such information.³⁵ The opinion did observe that the trial court had instructed the jury, when the first police officer was called, that no inference was to be drawn from his refusal to testify. From this it appears that *Kynette* recognizes error could be committed where the prosecutor stages such an incident. The court in *Kynette* did not mention *People v. Plyler*. *Plyler*, it will be recalled, held no error can be committed under *any* circumstance.

In *DeGesualdo v. People* (1961),³⁶ the Colorado Supreme Court rejected the reasoning of *Plyler* and followed *Washburn*. Thus, it was held, where the jury knew that the witness was under indictment for the same offense and the witness exercised his privilege against self-incrimination and no instruction was given to disregard the witness' refusal, reversible error *had been* committed. It is significant that in *DeGesualdo* only three questions were asked of the witness.

³³ 53 Pac. at 554.

³⁴ CAL. ANN. PEN. CODE § 640.

³⁵ *Kynette*, 104 P. 2d at 802.

³⁶ 147 Colo. 426, 364 P. 2d 374 (1961).

Applying the test laid down by the earlier federal cases, *Namet* is a poor decision. Under this test there must be:

1. The asking of the privileged questions;
2. Bad faith on the part of the prosecutor;
3. An absence of a curative instruction; and
4. The questions must be sufficiently aggravated and prejudicial so as to demand reversal.

In *Namet* the trial court ruled that the Kahns' privilege against self-incrimination *did* exist since they were still punishable for conspiracy. The prosecutor interrogated Mr. Kahn in the face of the court's ruling that Mr. Kahn did not have to answer questions relating to third persons. Thus, the prosecutor had reason to believe Mr. Kahn would refuse to answer such questions. It is reasonable to infer that the questions were propounded so that the jury could draw an unfavorable inference towards the defendant. The majority in *Namet* refused to decide the issue of the impropriety of the instruction by holding the question was not preserved on appeal.

It is generally conceded that no inference should be drawn from the *defendant's* refusal to testify.³⁷ No inference for or against the defendant should be drawn when *a witness* exercises his privilege under the Fifth Amendment.³⁸ The defendant cannot control the testimony of the witness. It is, of course, possible that the testimony, if given, would be favorable to the defendant. And yet the court in *Namet* instructed: "*Nor should any inference be drawn against him because the Kahns (sic.) refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.*" (Emphasis added.) No objection was made and it was not assigned as error on appeal. The majority of the Court reasoned that the error had been waived.

Namet implied that four questions were not prejudicial. It was silent as to whether any particular number of questions were needed as a prerequisite for reversal. The majority cites *United States v. Hiss*³⁹ and characterizes the asking of the questions as a minor lapse during a long trial.

A survey of the cases indicates the test to be: Did the questions prejudicially affect the jury in the light of all the circumstances of the case?⁴⁰ No particular number of questions should be needed.

³⁷ *Slochower v. Board of Education*, 350 U.S. 551 (1956).

³⁸ Annot., 24 A.L.R. 2d 895, 896 (1950).

³⁹ *United States v. Hiss*, 185 F. 2d 822 (2d Cir. 1950).

⁴⁰ Thus the question basically resolves itself to a matter of degree to be determined by the appellate court. Annot., 86 A.L.R. 2d 1443 (1962) has an exhaustive discussion citing numerous cases involving factual situations in which this question has been decided.

"When a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused. If the prosecution knows when it puts the question that he will claim the privilege, it is charged with notice of the probable effect of his refusal upon the jury's mind."⁴¹

Considering all the circumstances, the four questions put to Mr. Kahn by the prosecutor constituted the only evidence which connected Namet with persons actually taking bets. That an inference was naturally drawn by the jury as to what the answers would have been is obvious from the questions and from the manner in which the incident was staged. Therefore, the questions were extremely prejudicial and should have entitled Namet to a new trial.

Of the three positions taken by the courts in this country, the Texas rule presents the best reasoning. The Texas court will reverse when bad faith is found even though a curative instruction is given.

Viewed objectively, an instruction telling the jury to disregard the witness' refusal to answer does little more than to call their attention to it again. There is an odium in the public mind for the Fifth Amendment. This odium quite naturally reflects on the defendant when the witness refuses to testify. A curative instruction will not cleanse the result. To state that it will is naive. Texas, realizing this, has with pragmatic zeal fostered the most liberal rule in this area. If the appellate court finds the prejudicial error was sufficiently aggravated, an instruction will not suffice. *This should be the rule throughout the country.*

G. Dennis Adams

CONFLICT OF LAWS—GAMBLING CONTRACT, VALID WHERE MADE, HELD UNENFORCEABLE BY FORUM PUBLIC POLICY. *Intercontinental Hotels Corporation v. Golden* (N.Y. 1963).

Golden borrowed \$12,000 from a Puerto Rican hotel to gamble at the hotel's dice tables. Under Puerto Rican law such gambling is legal.¹ Having lost the money, he returned to New York where the hotel sought recovery. Held: A gambling contract, although valid where made, was unenforceable in New York because of a constitutional prohibition against gambling that represented a deep-rooted

⁴¹ 262 F. 2d at 537.

¹ LAWS, PUERTO RICO, ANN., TIT. 15, ch. 5, § 71-84.